

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-1225

Docket No. 75-1225

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee

-against-

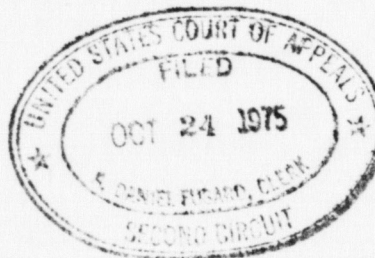
HENRY JONES,

Appellant.

-----x

BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION
RENDERED IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW
YORK.



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TABLE OF CONTENTS

	Page
TABLE OF CASES	i
ISSUES PRESENTED	1
STATEMENT PURSUANT TO RULE 28 (a) (3)	2
A. Preliminary Statement	2
B. Statement of Facts	2
(1) Failure to Establish Appellant Jones as a Co-Conspirator	3
(2) No Proof that Wacholder Check Uttered with Knowledge that it was Forged	4
(3) The Sentence	4

ARGUMENT

POINT I

THE GOVERNMENT FAILED TO ESTABLISH
THAT APPELLANT JONES WAS PART OF A
CONSPIRACY TO KNOWINGLY PUBLISH OR
UTTER FORGED FALSE OR COUNTERFEITED
CHECKS 5

POINT II

THE GOVERNMENT FAILED TO ESTABLISH
THAT APPELLANT JONES KNOWINGLY
UTTERED AND PUBLISHED A FORGED CHECK 9

POINT III

THE SENTENCE IMPOSED ON APPELLANT JONES
WAS REFLECTIVE OF THE COURTS DISENCHANT-
MENT WITH THE APPELLANT FOR NOT COOPER-
ATING WITH THE DEPARTMENT OF PROBATION 11

CONCLUSION

13

TABLE OF CASES

	Page
<u>Cleaver v. United States</u> , 238 F. 2d 766 (10th Cir. 1956)	8
<u>Evans v. United States</u> , 257 F. 2d 121 (9th Cir. 1958)	7
<u>Snowden v. Smith</u> , 413 F. 2d 94	12
<u>United States v. Cianchetti</u> , 315 F. 2d 584	8
<u>United States v. Cimino</u> , 321 F. 2d 509 (2d Cir. 1963)	7
<u>United States v. Cirillo</u> , 499 F. 2d 872 at 883 (2d Cir. 1974)	7
<u>United States v. Garguilo</u> , 310 F. 2d 249 (2d Cir. 1962)	8
<u>United States v. Holder</u> , 412 F. 2d 212	12
<u>United States v. Kearse</u> , 444 F. 2d 62 (2d Cir. 1962)	7
<u>United States v. Scott</u> , 457 F. 2d 848	10
<u>United States v. Stewart</u> , 451 F. 2d 1203 (2d Cir. 1971)	7
<u>United States v. Terrell</u> , 479 F. 2d 872 (2d Cir. 1974)	7, 8
<u>United States v. Thompson</u> , 452 F. 2d 1373	12
<u>Williams v. United States</u> , 402 F. 2d 47	12

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

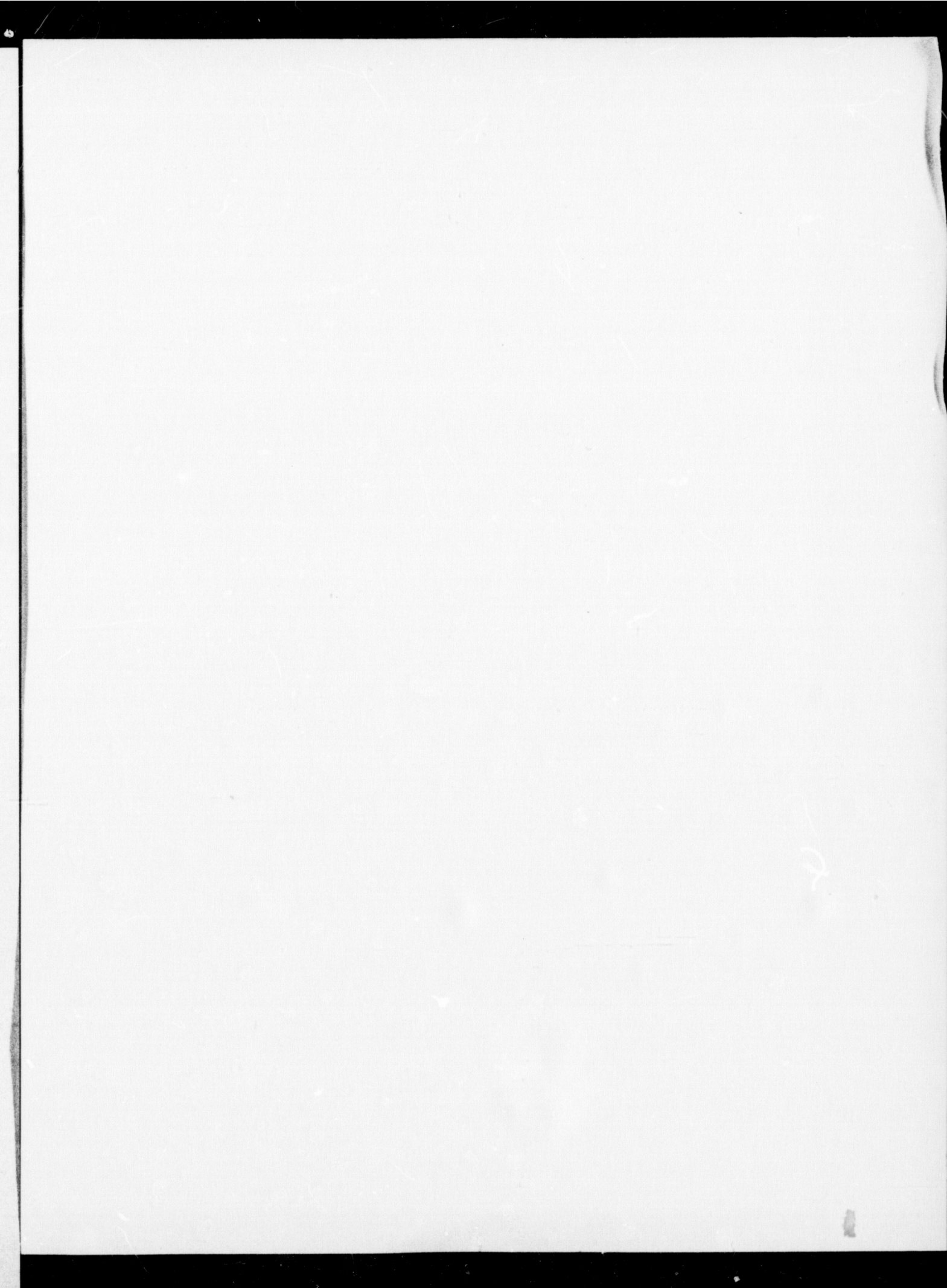
-against-

HENRY JONES,

Appellant.
-----x

ISSUES PRESENTED

1. Whether the presence of appellant Jones at premises where certain forged or stolen checks were issued to merchants, his giving a check out of the presence of other name co-conspirators and his act of offering and giving his personal check in payment for returned checks constituted acts to make him a co-conspirator.
2. Whether the check given to a merchant on 6 June 1972 with the endorsement of the payee, which check was not lost by the payee until 27 August 1972, was given with knowledge that it was a stolen, forged check.
3. Whether the Court in sentencing the appellant was punishing the appellant Jones for not cooperating with Probation and not imposing a sentence commensurate with the charges on which he had been convicted.



STATEMENT PURSUANT TO RULE 28 (a) (3)

A. Preliminary Statement

This appeal is from a judgment of the U. S. District Court for the Southern District of New York (Stewart, J.) rendered June 16, 1975, convicting appellant after trial by jury of the crimes of conspiracy (Title 18, U. S. Code, section 495) and forgery (Title 18, U. S. Code, section 495) and sentencing the appellant to a term of imprisonment for three (3) years on each count to run concurrently.

Timely notice of appeal was filed and this Court appointed Ozro Thaddeus Wells, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

Appellant Jones is presently serving the sentence pursuant to the judgment herein.

B. Statement of Facts

The appellant Jones was charged in two counts of a twenty-three count indictment* with one count of conspiracy to utter

*/ The original indictment filed on June 13, 1974 contained 34 counts with appellant Jones named in counts 1, 2 and 3 and counts 28 through 34. Count 2 and counts 28 through 34 were dismissed by the Trial Court. Two co-defendants, Thomas Duvall and Raleigh Porter were respectively charged with the remaining counts in the indictment. Duvall: Counts 1, 3, 18, 21 and 22; Porter: Counts 1, 19, 20 and 21. Porter was acquitted; Duvall was convicted and is a co-appellant herein.

Appellant was the proprietor of a quick food service "Steak and Take" restaurant located at 540 Lenox Avenue, City, County and State of New York in 1972 and on or about June 6, 1972 a merchant testified he was given a U. S. Treasurer's check in the amount of \$317.90 from which an amount was deducted in partial payment of a bill owed to the merchant. T-68 (11-15)* This check had been issued to a named payee, Benjamin Wacholder, who had lost this check on August 27, 1972 as a result of a theft. T-510 (2-23)

(1) Failure to Establish Appellant Jones as a Co-Conspirator

There was testimony from several merchant witnesses that in October of 1972 and at various times in 1973 that they had received checks from persons other than the appellant Jones which checks had been dishonored or returned. There was testimony that on some occasions when these merchants visited premises 168 Lenox Avenue, a restaurant doing business under the name of "The Prodigal Son", the appellant Jones was observed in the premises and on several occasions did offer and give his personal check in payment of a returned check. T-119 (12-18) T-317 (14-16) T-336 (3-9)

On every occasion when the appellant offered and gave his personal check he was not the person or persons who gave the

* / Reference is to Trial transcript page and line numbers.

check that had been returned nor was he ever present when the questioned check was given in the first instance. T-119 (2-14) T-126 (8-16) T-166 (8-18) T-267 (22-25) T-269 (21-22) On one of these occasions the merchant requested the appellant Jones to endorse the check given to him because the merchant knew Jones from previous business dealings, completely disassociated from the others named as co-conspirators. T-324 (4-25)

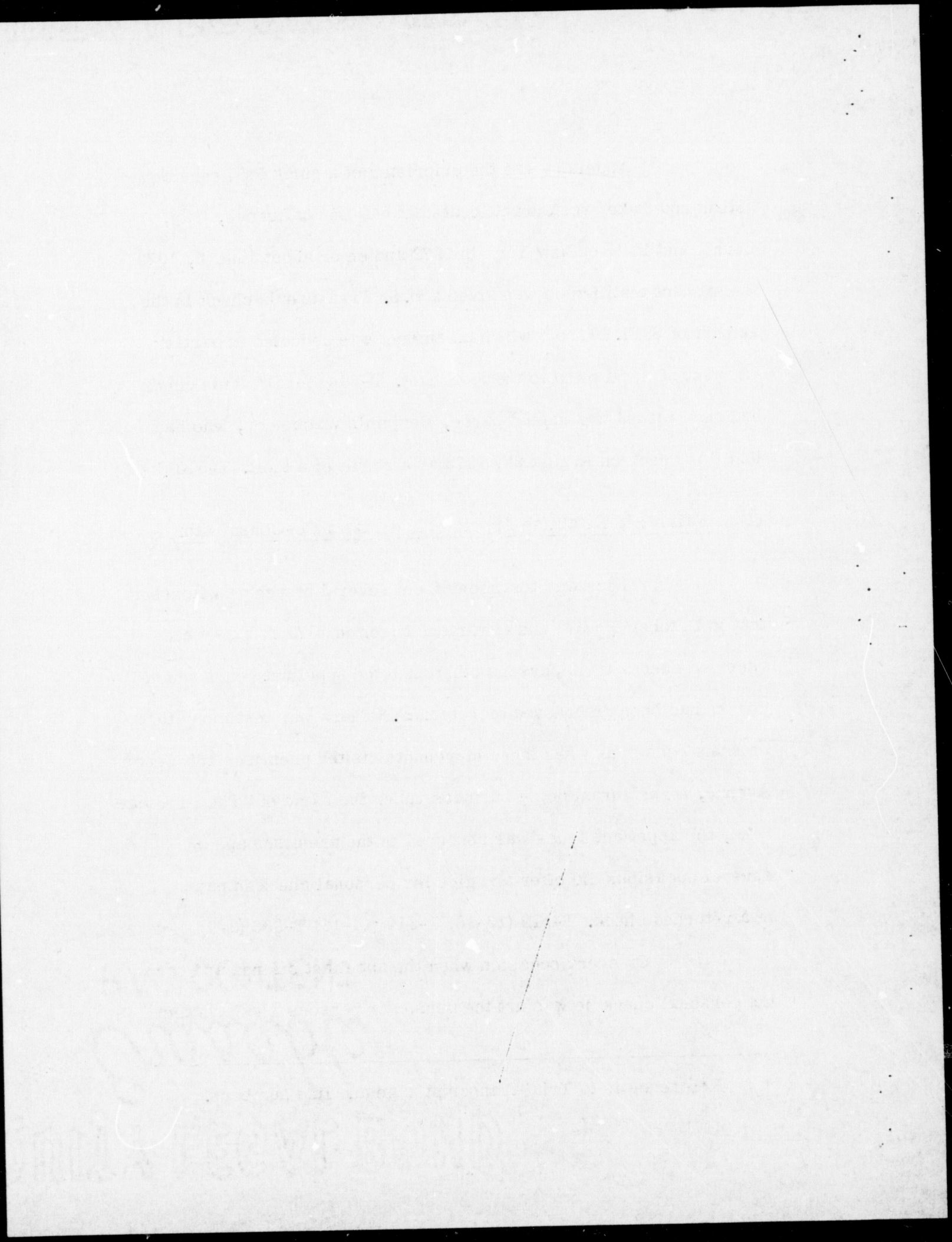
(2) No Proof that Wacholder Check Uttered with Knowledge that it was Forged.

The "Wacholder" check was given to a merchant, Albanese, in partial payment for goods received by appellant Jones. T-48 (2-24) The merchant testified that he received the check sometime around June 6 of 1972 T-48 (23-24) however, the named payee of the check testified that he did not lose possession of the check until August 27, 1972, more than two months after Mr. Albanese claims to have received the check. T-509 (17-25) T-510 (2)

(3) The Sentence

On 16 June 1975 appellant Jones appeared for sentence on his conviction for conspiracy and uttering a forged check.

The Court made special emphasis that the appellant did not cooperate with the Probation Department, S-40 (3-7)



S-41 (15-17)* and, proceeded to sentence appellant to three (3) years on both counts, to run concurrently. S-40 (13-15)

Appellant at the time of sentence had never been convicted of a Felony and moreover had been convicted on only two (2) counts of the indictment. A co-defendant and co-appellant herein was convicted on twenty counts of the twenty-three count indictment, and had also been previously convicted of a Felony and was given a sentence of three (3) years with six (6) months confinement and two (2) years probation.

ARGUMENT

POINT I

THE GOVERNMENT FAILED TO ESTABLISH THAT APPELLANT JONES WAS PART OF A CONSPIRACY TO KNOWINGLY PUBLISH OR UTTER FORGED FALSE OR COUNTERFEITED CHECKS.

An analysis of all the testimony relating to the merchants who had received U. S. Government checks that were dishonored does not implicate the appellant in what could even remotely be construed as a conspiratorial scheme or operation to defraud.

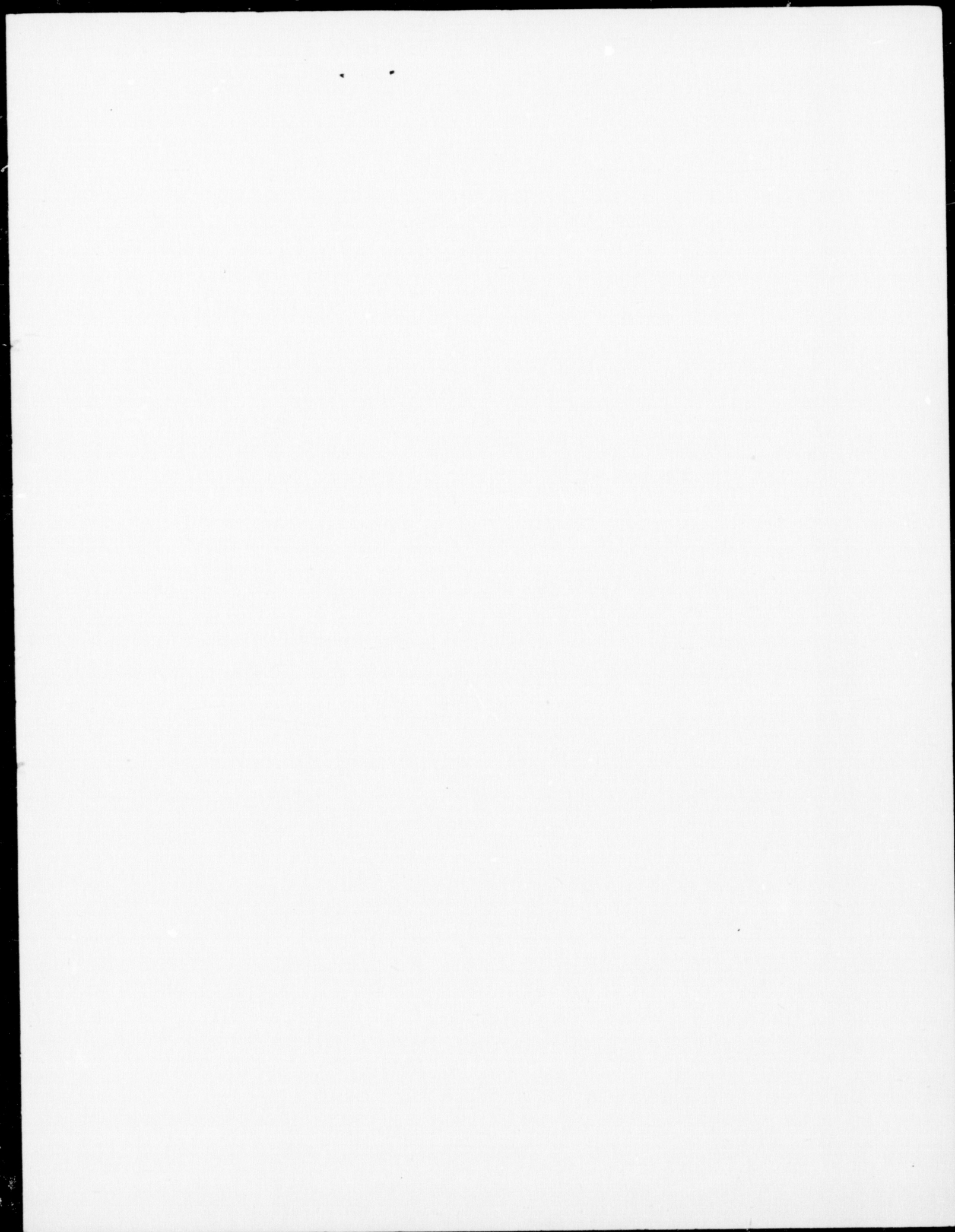
There is testimony and evidence by a Louis Albanese

* / Reference is to Sentence transcript page and line numbers.

that he received a check sometime around June 6, 1972 from the appellant. T-48 (16-24) There is not any evidence that any of the other named or unnamed as co-conspirators were present during this transaction, nor is there any evidence offered that any other person other than the appellant in any other way was involved in the handling or cashing of this check. T-67 (2-14) The record shows that this transaction took place at premises 540 Lenox Avenue and there is no showing or proof that premises 168 Lenox Avenue or the others named as co-conspirators were known to the appellant. There is not any proof presented whatsoever that this transaction was part and parcel of a conspiratorial act in which the appellant was involved.

The proof presented through all of the witnesses, who can be described as merchant witnesses, indicated that in each instant that a U.S. Government check, that was subsequently dishonored, was given to the merchant it was by someone other than the appellant and, moreover on these occasions the appellant was not present when the checks were given to the merchants. T-287 (14)

There were occasions when the appellant offered his personal check to recompense the merchant T-104 (24-25), and an instance when a merchant requested that appellant "stand behind" or vouch for the authenticity of the check he received. T-324 (4-25) Also, there was reference that the appellant was present on the



premises on some occasions. T-119 (12-18), T-317 (14-16), T-336 (3-9).

Mere presence, however, at the scene of an act, even when coupled with knowledge that at that moment a crime is possibly being committed, is insufficient to establish aiding and abetting or membership in a conspiracy.

U.S. v. Stewart, 451 F.2d 1203 (2d Cir. 1971)

U.S. v. Kearse, 444 F.2d 62 (2d Cir. 1971)

U.S. v. Terrell, 474 F.2d 872 at 875 (2d Cir. 1973)

"Mere association with persons engaged in a criminal enterprise or even presence at the scene of their crime will ordinarily not be enough--insufficient to establish guilt"

U.S. v. Cirillo, 499 F.2d 872 at 883 (2d Cir. 1974)

Evans v. U.S., 257 F.2d 121, 126 (9th Cir. 1958)

Mere meeting is no evidence of a conspiracy. U.S. v. Cimino, 321 F.2d 509, 510 (2d Cir. 1963).

The association with one or more of the conspirators does not make one a member of the conspiracy, U.S. v. Terrell, supra.

It is necessary that one should participate with knowledge of some of the purposes of the conspiracy and intends to aid in the accomplishment of the unlawful ends. Knowledge that a crime

is being committed, even when coupled with presence at the scene, without more is insufficient to prove aiding and abetting.

U.S. v. Terrell, supra at 875 (2d Cir. 1973)

U.S. v. Garguilo, 310 F. 2d 249 at 253 (2d Cir. 1962)

Surely the offering and giving of the appellant's personal check is not intending to aid in uttering or publishing a forged or stolen check. The effect of this act would be to obtain the return of the dishonored check with the acceptance of the appellant's personal check. Accordingly, this does not establish participation in any conspiracy to knowingly publish or utter forged, stolen, false or counterfeited checks.

Knowledge of the existence and goals of a conspiracy does not of itself make one a co-conspirator, U.S. v. Cianchetti, 315 F. 2d 584 at 588. There must be something more than mere knowledge, approval or acquiescence in the object or the purpose of the conspiracy. Cleaver v. U.S., 238 F. 2d 766 at 771 (10th Cir. 1956).

The only evidence produced by the Government was that the appellant during some time in 1972 operated a restaurant business at a location completely different from the location of the other named co-conspirators, and offered no proof that would in any way connect the premises 540 Lenox Avenue to premises 168

Lenox Avenue and on occasions he offered his personal checks to cover a dishonored check given by someone else.

The judgment herein should be reversed and the indictment dismissed.

POINT II

THE GOVERNMENT FAILED TO ESTABLISH THAT APPELLANT JONES KNOWINGLY UTTERED AND PUBLISHED A FORGED CHECK.

The Government produced a witness who testified that the appellant Jones on June 6, 1972 gave to a merchant a U. S. Government check in the amount of \$317.90 from which check 50 - 60 dollars was deducted and the remaining balance was given to the appellant Jones T-68 (11-14). However, the Government also produced the named payee of said check, a Mr. Benjamin Wacholder, who stated he had the subject check in his possession up to 27 August 1972 T-509 (24) T-510 (2).

The proof must establish that as of the date charged in the indictment the appellant uttered or published the check.

According to the proof presented here the appellant would have uttered the check at a date more than two (2) months

before the check was lost by the payee. The variance as to dates is monumental in that the only overt act which recites actions by the appellant could not have possibly occurred. There is no substantial similarity between the date of June 6, 1972 and August 27, 1972 that could sustain the imputing of knowledge that the check was stolen, published or forged.

The signing of the check by the appellant in a name other than his true or given name does not establish knowledge of a fraud nor establishes a forgery.

"A person without abandoning his real name may use assumed name to identify himself in the transaction of his business..."

U. S. v. Scott, 457 F.2d 848, 849
(Footnote) (10th Cir. 1972)

The signing of a different name did not defraud through a mistake of identify. The recipient of the check testified that it made no difference to him what signature the appellant signed.
T-55 (22).

Accordingly, the judgment should be reversed and the indictment dismissed.

POINT III

THE SENTENCE IMPOSED ON APPELLANT JONES WAS REFLECTIVE OF THE COURTS DISENCHANTMENT WITH THE APPELLANT FOR NOT COOPERATING WITH THE DEPARTMENT OF PROBATION.

The Court in imposing sentence on appellant did impose a sentence within the statutory limit, however when the sentence of the appellant is viewed in light of the sentence imposed on a co-defendant and co-appellant herein it is apparent that there is a blatant inconsistency which was the result of an impermissible approach.

The co-defendant co-appellant was convicted on the one conspiracy count and on at least eleven (11) felony substantive counts; the appellant Jones was convicted on the one conspiracy count and one substantive count; The co-defendant Duvall had been previously convicted of crimes including a robbery; The appellant Jones had never been convicted of a felony.

The sentence imposed on the co-defendant Duvall was three (3) years with six (6) months confinement, and execution of remainder of sentence was suspended with two (2) years probation.

The appellant was sentenced to three years imprisonment.

Erased
RAG CONTENT

UNITY LEGAL BOND

Erased

RAG CONTENT

It is apparent that the appellant was singled out for an unjustifiably heavy sentence which constitutes an abuse by the trial judge. This clear abuse of discretion by the trial judge mandates interference by this to rectify the wrong imposed on the appellant.

The sentence imposed on the appellant can be characterized as an abuse of discretion so as to violate traditional concepts which would authorize this Court to intervene.

Snowden v. Smith, 413 F. 2d 94

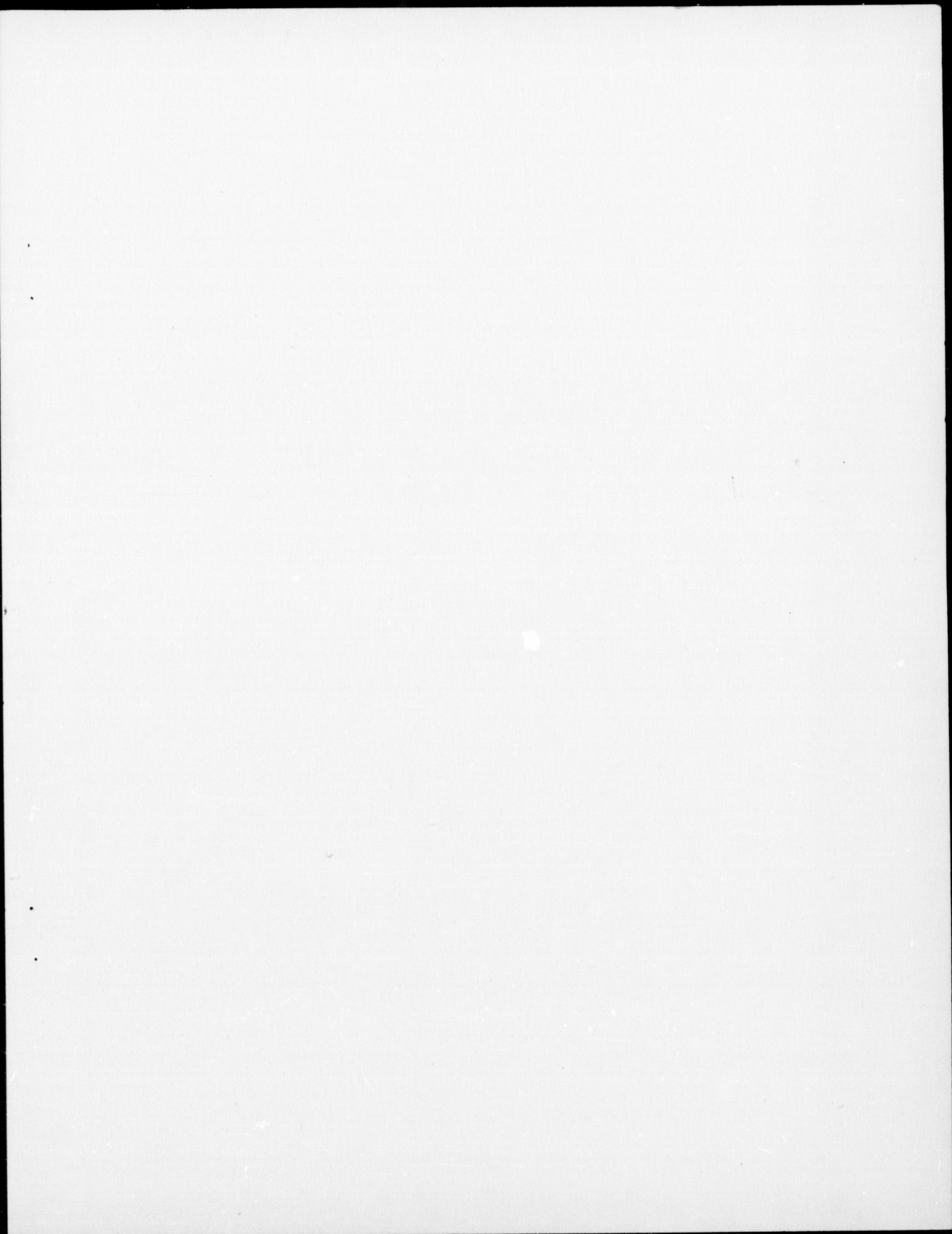
U.S. v. Thompson, 452 F. 2d 1373

Williams v. U.S., 402 F. 2d 47

U.S. v. Holder, 412 F. 2d 212

An examination of the sentencing transcript reveals that the sentencing Judge emphasized his disapproval of appellant Jones' non-cooperation with the Department of Probation. Therefore, it is apparant that solely for this reason the sentencing Judge was personally chagrined at appellant and abused his discretion by imposing a punishment on appellant for his non-cooperation with Probation.

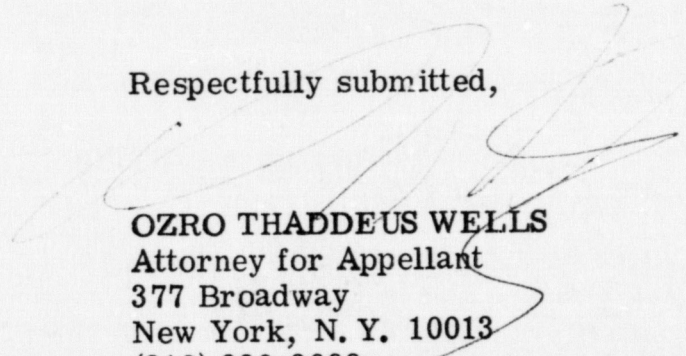
The judgment must be reversed and the matter remanded for resentencing.



CONCLUSION

THE JUDGMENT SHOULD BE REVERSED
AND THE INDICTMENT DISMISSED. IN
THE ALTERNATIVE, A NEW TRIAL
SHOULD BE ORDERED. IN THE ALTER-
NATIVE, THE MATTER SHOULD BE
REMANDED FOR RESENTENCING.

Respectfully submitted,



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October 17, 1975

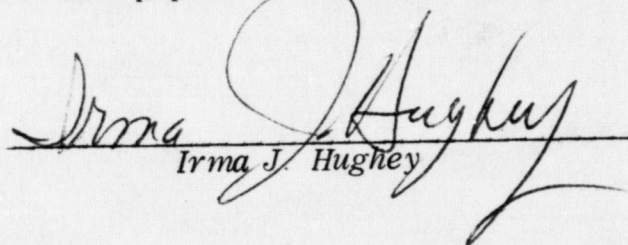
STATE OF NEW YORK

COUNTY OF NEW YORK

Irma J. Hughey being duly sworn, deposes and says:

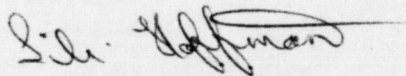
deponent is not a party to the action, is over 18 years of age and resides at 2829 Sedgwick Avenue, Bronx, New York, 10468.

On October 24, 1975, deponent served the within brief ~~and Appendix~~ upon Jessie Berman, Attorney for the Joint Appellant in this action at 351 Broadway, New York, New York 10013, the address designated by said attorney for that purpose by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney therein.


Irma J. Hughey

Sworn to before me on this

the 24 th day of October, 1975.


LILI HOFFMAN
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1976

Received 10/24/75
Steve Bent
for Gene Bero

